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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 816

THE NEW YORKER MAGAZINE, INC.,
Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York, and GEORGE M. BRAGALINI, as Treasurer of the City of New York,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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Preliminary Statement

The appellant has appealed from a final order of the Court of Appeals of the State of New York dated July 3, 1957; motion for reargument denied by order of that Court dated October 17, 1957.

The opinion of the Appellate Division of the New York State Supreme Court, First Judicial Department, is officially reported in 2 AD 2d 600 and the opinion of the Court

of Appeals of the State of New York is officially reported in 3 NY 2d 362. Both opinions are set forth in Appendix A of the appellant's statement as to jurisdiction.

By this appeal, the appellant challenges the constitutional validity of the New York City General Business and Financial Tax, as imposed on it for the privilege of carrying on business within the City, to the extent that the tax is measured by appellant's gross receipts from advertising. It contends that the tax, to the extent that it is measured by such receipts, is repugnant to the Commerce Clause.

It also contends that the City of New York, in taxing its advertising receipts as receipts from a local business while taxing receipts from interstate sales and from radio and television broadcasting as receipts from interstate commerce, deprives it of its property without due process of law and denies it the equal protection of the laws.

Appellees move to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes and Regulations Involved

The statutes imposing the tax, and the regulations of the Comptroller of the City of New York issued thereunder, are set forth in Appendix B of the appellant's statement as to jurisdiction.

Statement of the Case

This proceeding was brought under the provisions of Article 78 of the Civil Practice Act of the State of New York to annul and correct determinations of the Comptroller of the City of New York denying refund of general business taxes and assessing additional such taxes for the three year period, 1947-1949, inclusive, in the total principal amount of $18,633. The determinations under review were made as the result of a hearing held by the Comp-

troller of the City of New York at which evidence was taken. Appellant appeared, and was represented by counsel, at such hearing and both sides introduced testimony at the hearing.

Under the practice in New York the adminstrative hearing constitutes the trial of the issues in the case (Civil Practice Act, Article 78). The determinations issued in this case as a result of the hearing were first reviewed by the Appellate Division, First Department, which unanimously confirmed them. Upon appeal by appellant to the Court of Appeals of the State of New York that court unanimously affirmed.

Both courts wrote opinions, and both held the case to be directly controlled by *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938).

Facts

I

Appellant is a New York corporation engaged in the business of publishing "The New Yorker," a weekly magazine. It has not qualified to do business in any other state (fols. 145-146, 272, 964-966).

Appellant's operating and executive offices are situated at 25 West 43rd Street, in the Borough of Manhattan, City of New York, and it occupies several floors of the building at that address (fols. 279, 311-313, 445-446). This is its only place of business, except for an advertising sales office in Chicago (fols. 275-277).

Blanchard-Nichols, an independent concern with offices in San Francisco and Los Angeles, California, and Atlanta, Georgia, has a contract with appellant to solicit advertising for appellant and it assigns one man in each of its aforesaid offices to this activity (fols. 276-277, 283-284, 417-418).

II

Appellant owns no printing equipment and does not print the magazine itself (fols. 279-280, 299). The magazine is printed by an independent company, the Condé Nast Press, at its printing plant in Greenwich, Connecticut, under a contract with appellant (fols. 275, 1010-1011; City's Exhs. A and B). There is no corporate connection between the printer and appellant (fols. 273-274).

The magazine is entered as second-class matter with the post office in the City of New York (Appellant's Exhs. 3-6).

Appellant has no office at the printing plant and no employees regularly stationed there (fols. 315, 966-975, 995-998). Under the contract appellant furnishes the paper on which the magazine is printed. This paper is stored by the printer in its general warehouse until needed (fols. 1036, 1059-1063).

III

The main office of appellant's advertising department in its New York City office is responsible for the acceptance of all the advertising carried in the magazine (fols. 410-412, 422-427, 436-437). This involves not only credit approval but approval for taste as well, as "The New Yorker maintains a very high standard of advertising acceptability" (fols. 423-425).

The advertising department keeps a record of all space contracted for by advertisers in future issues of the magazine (fol. 438). Prior to the closing date for a given issue the advertising agency or advertiser sends in cuts and copy of the proposed advertisement (fols. 437-440). Most of them are received by appellant's advertising department in New York City, but on rare occasions, when they come in very late, they go directly to the printer (fols. 439-440, 487-488, 494).

In either case, the printer prepares a proof and sends it to the appellant's advertising department in New York City, which maintains a "dummy," constituting an exact replica of the advertising to be included in the issue itself. If the proof is accepted by the advertising department, it is added to this dummy (fols. 438-442, 477-478).

The advertising dummy is sent by the advertising department to the printer each week, together with a dummy of editorial matter prepared and sent by the editorial department. The printer is required to follow these dummies exactly in printing the magazine (fols. 447-450).

Any last minute changes with respect to advertising matter are authorized by a telephone call to the printer from appellant's advertising department in New York City (fols. 497-500).

A group of five or six employees of the editorial department go to the printing plant for part of one day a week to check, proofread and make final changes in editorial matter (fols. 314-315, 1012-1023). These individuals make no changes in the advertisements (fol. 1034).

IV

The distribution of the magazine is supervised and directed by the circulation department, consisting of a manager and 55 employees, all located in appellant's New York City office (fols. 269-270, 311-312, 729-730). That department maintains the list of subscribers and prepares the mailing wrappers for the magazines (fols. 715-717, 724). The printer ships the magazines as directed by this department (fols. 717-723).

Under the printing contract, Condé Nast is required to deliver the magazines "to Grand Central and General Post Offices N.Y.C." (City's Exh. A, p. 4; City's Exh. B, p. 5). The actual practice appears to vary from the contract

somewhat. Appellant's circulation manager testified that copies of the magazine are mailed to subscribers and newsstands both at the New York Post Office and at the Greenwich, Connecticut Post Office (fols. 719-720).

V

Appellant publishes and sells only one magazine, "The New Yorker." The magazine circulates throughout the country, including the City of New York where it has approximately 20% of its circulation. All copies of the magazine are identical, except that the copies which circulate in the New York City metropolitan area (called the "city" edition) contain a few additional pages of advertising and some additional editorial matter not found in the copies circulated elsewhere (fols. 145-148, 172-174, 471-472, 941-943). The additional editorial matter appears to be confined to a listing, on approximately one page, of the motion pictures being shown in New York City neighborhood motion picture theaters.

The additional advertisements inserted in the copies of the magazine that circulate in the New York City area are those of local stores and other advertisers desiring to reach only this marketing area (fols. 394-395). But, except for these relatively few advertisements, every advertisement in the magazine appears in identical form in every copy of the magazine, including the copies circulated in the City of New York (fol. 901).

For its own convenience, and to fix advertising rates, the copies of The New Yorker magazine that circulate in the New York City metropolitan area are designated by appellant as the city or metropolitan edition; the copies that circulate outside this area are referred to as the star or out-of-town edition (they bear a small star on the front cover); and the total number of copies is known as the entire or complete edition (fols. 146-148, 394-395, 941-943). However, in selling the magazine no such distinctions are

made. All copies are sold as copies of The New Yorker magazine and are identical in price, appearance and format.

Except for the star on the cover, it is impossible to tell one copy from another, short of a careful page by page comparison. Appellant itself, in reporting its circulation to the Audit Bureau of Circulations, characterizes the differences as a "slight difference in editorial content and arrangement, and a small difference in advertising content" (Appellant's Exh. 14, par. 28, p. 391 of the record).

Appellant did not accept advertising solely in the so-called star or out-of-town edition; i.e., the copies of the magazine which were circulated outside the New York City metropolitan area. An advertiser could advertise in the so-called "entire" edition (obtaining national coverage, including New York City) or in the "city" edition (obtaining coverage of the metropolitan New York City area only). It was given no third choice (fols. 1162-1163). Hence, every advertisement accepted by appellant circulated in the City of New York, either as printed in the city edition copy of the magazine, or in both the city and star edition copies.

VI

Appellant's advertising receipts are not taxed in any state or local jurisdiction outside of the State of New York (fols. 960-964). The appellant's assertion that Connecticut is threatening to tax it is not based on anything in the record. The asserted threat of tax is not claimed to involve taxation based on advertising or advertising receipts.

The City of New York excluded the receipts of appellant's Chicago office in taxing its advertising receipts herein. The tax for 1949 was imposed on $4,953,656 of advertising receipts. It amounted to $9,907 (at the rate of ⅓ of 1%), of which $7,552 is disputed by appellant.

The tax for 1948 was approximately the same, and for 1947 was less, since the rate of tax was 1/10 of 1% in that year (Appellant's Exh. 36).

In its statement of the facts the appellant states that the tax was based on more than 100% of the advertising receipts because of the inclusion of advertising agency commissions (statment as to jurisdiction, p. 8). The appellant, however, withdrew "any claim for a refund of tax" assessed with respect to advertising agency commissions and discounts, but, nevertheless, sought to reserve the right to argue arbitrariness (fol. 1107).

The tax on appellant's circulation receipts was apportioned to reach only receipts from the sale of the magazine in New York City, and no issue is raised with regard to the tax on circulation receipts (Appellant's Exhs. 31-33, Record, pp. 417-441; Appellant's Exh. 36).

POINT I

The challenge to the constitutionality of the New York City General Business and Financial Tax as applied to appellant's advertising receipts in this case presents no substantial federal question since the case is indistinguishable from, and is squarely controlled by, *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938).

The issue in this case is not novel or unsettled, and the decision of the Court of Appeals of the State of New York is not in conflict with any decision of this Court. In fact it is expressly and wholly based on the decision of this Court in the case of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938).

No substantial federal question is presented since the *Western Live Stock* case is indistinguishable from this case on the facts and is still sound law.

A. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) is controlling in the present case.

I

In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) this Court held constitutional a New Mexico privilege tax, measured by the amount or volume of business done, as applied to the gross receipts received by a magazine publisher from the sale of advertising space. The issue was stated to be whether such a tax on publishers "who sell without the state, to advertisers there, space in a journal which they publish in New Mexico and circulate to subscribers within and without the state, imposes an unconstitutional burden on interstate commerce" (303 U. S. at p. 252).

The following description of the business of the Western Live Stock concern appears at page 8 of the record of that case in this Court:

> "the contracts negotiated and entered into with such advertisers provide for and contemplate a continuous passage of contracts, correspondence, plates, cuts, mats, engravings, copy, intelligence and information from the advertiser across state lines to plaintiff, the printing of such advertising in its journal, and its circulation and distribution in such journals by means of motor trucks, railroads, express, and the United States mails throughout the states of the United States * * *."

This Court held that the mere formation of the advertising contracts between persons in different states did not bring the advertising within the protection of the Commerce Clause (303 U. S. at p. 253). It then rejected the argument that such protection applied because the publication had an interstate circulation. It held

that the business taxed was "distinct from interstate commerce" and that (p. 258):

> "the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce."

II

The New Mexico statute involved in the *Western Live Stock* case imposed "privilege taxes, measured by the amount or volume of business done," at different rates on different businesses. The tax was imposed on the business of publishing newspapers and magazines at the rate of 2% of the gross receipts; "but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space" (303 U. S. at p. 251, footnote 1).

The tax here in issue is imposed "for the privilege of carrying on * * * business" within the City. The rate is 1/5 of 1% and the tax is measured by "all receipts received in and/or allocable to the city" (General City Law of the State of New York, sec. 24-a, subsec. 2a; Administrative Code of the City of New York, sec. B46-2.0, subd. a).

Thus, both are privilege taxes imposed on magazine publishers for the privilege of engaging in the publishing business within the taxing jurisdiction and are measured by gross receipts.

III

In the *Western Live Stock* case the Court said that the "preparing, printing and publishing is peculiarly local and distinct from its circulation" (303 U. S. at p. 258). The appellant argues that in the case at bar both the printing and publishing of the magazine advertising were carried on largely outside New York and that part of the preparation was done in Connecticut.

We shall now show that, to the extent that appellant participated in them, the preparation, printing and publishing of advertising matter were done by it entirely in New York City.

a. *Preparation*

In neither the *Western Live Stock* nor in the present case did the publisher create the advertisements. In both cases the advertiser or the advertising agency prepared the "cuts, mats, engravings (and) copy" and sent them to the magazine (*Western Live Stock record*, p. 8).

All advertising orders are accepted by appellant at the New York office. The advertising is "carefully scrutinized" by appellant which exercises a "very close censorship" and places a quota on liquor advertising (fol. 869). In fact, where the advertising does not meet the appellant's standards, the advertiser is told what he should put in the advertisement and is given the option to "either accept our recommendations or withdraw the advertising" (fols. 871-873). Each year 30 to 40 accounts are rejected for failure to meet appellant's standards or because of its liquor quota (fols. 880-883).

This supervision over advertising exceeded anything shown in the *Western Live Stock* case.

b. *Printing*

While it is true that the actual printing is done by an independent Connecticut printer, every aspect of the printing in which the appellant participates is done at the New York office or under its direction. The makeup department in New York determines where each advertisement will be placed in the magazine and prepares a dummy which is an exact replica of the issue (fols. 438-439). This dummy is a guide for the printer who must follow it in all respects (fols. 445, 448-450). The proof is then sent to the appellant in New York (fols. 442, 478). All last

minute changes relating to advertising are made by telephone from the New York office to the printer (fols. 497-499).

No one from the advertising department goes to Connecticut and that department does not in any way participate in the printing aside from the New York activities just described. The once-a-week trips to the printer by a few members of the editorial department have nothing to do with advertising (fol. 1034). Their last minute revisions and checking of copy are confined to the editorial matter.

The exclusively local activities of this appellant with respect to advertising are no less local because an independent third party does the printing in another state. The mere fact that the appellant does not do the printing itself cannot transform its advertising activity into interstate commerce or bar the imposition of the tax. Certainly, no such argument could be advanced if the third party printer were located in New York. Nor can the chance fact that the independent printer is located in Connecticut alter this. There is no basis for treating the printing in Connecticut, which is done by a third party, as though it were an activity actually performed by the appellant itself in another state.

c. ***Publishing***

The claim that the magazine is "published" in Connecticut is directly contradicted by the legend contained on the index page of The New Yorker magazine itself, which reads as follows (p. 2 of Appellant's Exhs. 3 and 4):

> "The New Yorker, published weekly by the F. R. Publishing Corporation, 25 W. 43rd St., New York 18, N. Y. * * * Entered as second-class matter, February 16, 1925, at the post office at New York, N. Y. * * * Printed in U. S. A. * * *."

The contract with the printer called for shipment to the public from New York ("Roll wrap and deliver to Grand Central and General Post Offices N. Y. C.", City's Exh. A, p. 4; City's Exh. B, p. 5). And all circulation instructions were issued from appellant's office in New York (fols. 729-730).

The New York address is given as appellant's office on the rate cards (record, pp. 385-386), in official announcements (*id.*, pp. 387-388), in statements and reports to the Audit Bureau of Circulations (*id.*, p. 391; Pet's Exhs. 15, 16, 17, 29, 30) and in promotional material (record, pp. 407, 409, 411; Appellant's Exh. 39).

Surely the independent Connecticut printer is not the publisher. It seems equally clear that the place of publication does not shift from New York to Connecticut simply because the printer mails some of the copies of the magazine from the latter state.

IV

Just as in the *Western Live Stock* case, there is no danger of multiple taxation of the advertising receipts in the present case. Any risk of multiple taxation arising from the possibility that a state where the appellant has an office for the solicitation of advertising might tax such receipts has been eliminated. All receipts from the one such office maintained by the appellant have been excluded from the measure of the tax. Nor can the mere fact that the magazine circulates in other states furnish such states with a basis for taxing the advertising receipts (303 U. S. at p. 260).

Similarly, there is no danger of taxation of the advertising receipts by Connecticut. On this point it suffices to quote the well reasoned statement of the intermediate court below (2 AD 2d at p. 604):

"In this case the fact that taxpayer's printing is done in the State of Connecticut does not create that danger, because the printing is done under independent contract, and there is no localized ownership (and therefore activity) of an integral part of the unitary operation of publishing, editing and printing a magazine. The localized activity there, then, becomes that of the printer, rather than of this taxpayer. To the point urged by the taxpayer here, that it warehouses large quantities of paper in Connecticut in order to serve its printer and may, therefore, be subject to local taxation in Connecticut, it must be assumed that any such local taxation, to be valid, could not be a privilege-of-doing-business tax, although it might be a property tax, or tax based on use, or other non-privilege local tax."

V

Appellant's use of so-called "editions" in selling its magazine does not establish a circulation pattern essentially any different from that in the *Western Live Stock* case. In that case all copies of the magazine were the same. Here, the copies of the New Yorker that circulate within New York City are essentially the same as the copies circulating elsewhere. In editorial content there is only a very slight difference. And in advertising content there is no difference whatsoever except that the copies circulating within New York City contain a number of advertisements omitted from the copies circulated elsewhere.

Nor does the appellant's national circulation cause this case to differ from *Western Live Stock*. In that case this Court proceeded on the assumption that the advertising contract stipulated "that the advertisements shall be sent to subscribers out of the state, or is so framed that the

compensation would not be earned if subscribers outside the state should cancel their subscriptions" (303 U. S. at p. 254).

B. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) is still sound law.

During the twenty years since the *Western Live Stock* case was decided this Court has referred to it in thirty different decisions: twenty-five times in majority opinions; three times in dissenting opinions; and twice in dismissing appeals for want of a substantial federal question. In none of these cases has the authority of the decision been overruled or questioned. In every instance it is cited with approval.

Appellant appears to rely principally on the three cases of *Lorain Journal Co.* v. *United States*, 342 U. S. 143 (1951); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939) and *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650 (1936).

The *Lorain Journal* case involved a Sherman Antitrust Act prosecution against a newspaper publisher to enjoin it from monopolizing commerce. In sustaining the Federal Government's jurisdiction this Court relied on cases which specifically state that federal regulation may extend to activities which are, beyond dispute, subject to state taxation.

> *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 311 (1923);
> *Stafford* v. *Wallace*, 258 U. S. 495, 525-528 (1922);
> *Swift & Co.* v. *United States*, 196 U. S. 375, 399-400 (1905).

In fact, the Sherman Act may be applied to competitive practices which, for tax and other purposes, are regarded as wholly intrastate.

United States v. *Wrightwood Dairy Co.*, 315 U. S. 110, 120 (1942);
Mandeville Farms v. *Sugar Co.*, 344 U. S. 219, 234 (1948).

Most significant is the fact that the Court in the *Lorain Journal* case decision made no reference to the *Western Live Stock* case, although counsel for the publisher relied upon it in his brief. And the subsequent references by this Court to the *Western Live Stock* case in two 1954 decisions (*Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157, 165-166, 169-170 and *Braniff Airways* v. *Nebraska State Board*, 347 U. S. 590, 597-598) indicate that its authority has not been limited.

Gwin, White & Prince, Inc. v. *Henneford*, 305 U. S. 434 (1939), involved a Washington privilege tax, measured by gross receipts, applied to a Washington concern selling produce in other states and in foreign countries. The tax, as measured by the receipts from such sales, was held to be invalid on the ground that it was an unapportioned tax on activities extending beyond the limits of the state.

The case might be relevant if the present tax were imposed on appellant's receipts from the circulation of its magazine in states other than New York. But the appellant's receipts from circulation have been taxed, without challenge, only to the extent of the receipts from circulation of the magazine within the City of New York. The only dispute relates to the tax on appellant's separate and distinct local advertising receipts.

In the *Gwin White* decision the Court expressly distinguished the situation in that case from the *Western Live Stock* case. It said that the states to which the commerce extended were in a position to impose a tax similar to the Washington tax on the activities carried on in those states, thus exposing the business to the risk of multiple taxation, whereas such a risk was absent in the *Western Live Stock* case (305 U. S. at pp. 439-441).

With regard to the *Fisher's Blend Station* case, the obvious answer is that it was considered in the *Western Live Stock* case and distinguished on the ground that broadcasting is "itself interstate communication" (303 U. S. at p. 260).

POINT II

The appellant's due process and equal protection contentions are completely without merit.

The appellant's argument is that it is being discriminated against because other businesses have been taxed on an allocation basis while all of its advertising receipts from its New York office have been taxed. The answer is that the allocations were all required by the federal constitution under rulings by this Court. The appellant appears to concede that this is so, but asserts that there is no "factual" difference" between it and those who pay tax on an allocated basis. Its argument comes down to a repetition of its Commerce Clause contention or a claim that one not protected from state taxation by the Commerce Clause may limit such taxation on the ground that it resembles those protected from taxation by the Commerce Clause.

The appellant argues also that, since the tax law authorizes the Comptroller to decide the circumstances in which allocation of tax is required by the federal constitution, the validity of this administrative action may be judicially reviewed.

Such a delegation of powers to the Comptroller is necessary and valid. *Olive Coat Co.* v. *McGoldrick*, 287 N. Y. 769 (1942); *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, 215 (1936).

So far as the Comptroller's determination affects the appellant it is reviewable and has been reviewed in the present case. On the other hand, the appellant cannot escape tax simply because, in interpreting this Court's

decisions concerning the Commerce Clause, the Comptroller may have made an error in concluding that another class of taxpayers cannot be taxed except on an allocated basis. *Charleston Assn.* v. *Alderson*, 324 U. S. 182, 190-191 (1945); *Snowden* v. *Hughes*, 321 U. S. 1, 8-9 (1944). Moreover, no such error has been shown.

CONCLUSION

The appeal to this Court from the order of the Court of Appeals of the State of New York should be dismissed.

March 17, 1958.

Respectfully submitted,

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